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March 14, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Second Report and Order in the matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (WT 17-79)
Ex Parte Filing

Ms. Marlene H. Dortch:

The Cherokee Nation (Nation) has engaged with the Federal Communications Commission (FCC) through the Telecommunication Cell Notification System (TCNS) since 2015. The Cherokee Nation Tribal Historic Preservation Office (Office) utilizes TCNS to ensure that FCC's responsibility to engage in government-to-government consultation is met efficiently and accurately while protecting the Nation's cultural and historic resources and ensuring they are protected from proposed undertakings. While the Nation understands and values the importance of improving broadband deployment, especially for our citizens in rural areas with low coverage, the Nation urges the FCC to uphold its Federal responsibility with government-to-government consultation under Executive Order 13175, the National Historic Preservation Act (NHPA, 54 U.S.C. § 300101 et seq) and its implementing regulations (36 CFR part 800). The Nation appreciates the opportunity to comment upon the *Second Report and Order in the matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (WT 17-79) (*Second Report and Order*) released on March 1, 2018.

TCNS, in its current state, works for the Nation. Developed in consultation with Tribes and the FCC for over a year, TCNS allows this Office to protect the Nation's cultural and historic resources while working with applicants to address proposed undertakings. Thus far, TCNS has been consistent and in the balanced interest of all parties. The volume of TCNS requests received by this Office requires focused review and input. Last fiscal year, this Office responded to approximately 3,600 proposed undertakings with a 100% response rate within thirty days with no adverse effects to the Nation's cultural and historic resources. The *Second Report and Order* assumes that a lack of adverse effects may be due to an absence of cultural and historic sites. However, the Nation actively responds and works with applicants to adjust work plans and find amenable locations to ensure that the Nation's resources are protected. The *Second Report and Order* seeks to undercut a positive process that has worked for both applicants and the Nation.

Consultation is an integral part of the Section 106 process. The *Second Report and Order* contemplates policy changes that will impact Indian communities, including the exclusion of

small cell wireless facilities from the Section 106 process and the lack of upfront research fees (paragraphs 4 and 6). These proposed exemptions, thus, represent significant changes to the Section 106 regulations and should be considered “federal agency program alternatives” under 36 CFR §800.14. Thus, government-to-government consultation with Tribal Historic Preservation Offices is outlined and anticipated under §800.14(c).

The *Second Report and Order* notes that the number of meetings with FCC staff meets required government-to-government consultation. However, none of the topics pertaining to the removal of upfront research fees or exclusions of cell wireless facilities were raised during these discussions. The *Second Report and Order* lists several meetings that the Nation attended for informational purposes only: Broken Arrow, OK in July 2017; Pala, CA in August 2017 hosted by the National Association of Tribal Historic Preservation Officers (NATHPO); and a series of three FCC phone meetings held in January 2018 (paragraphs 22, 23, and 28). The Nation maintains that these meetings do not constitute government-to-government consultation.

To the Nation, effective government-to-government consultation requires certain elements, including adequate notice, a finalized agenda focused on the topics at hand, and sufficient time for the Nation to engage with the Federal agency and/or Interested Tribes in collaborative discussion aimed toward balanced resolution. In the above meetings that the Nation did attend, there was either insufficient notice, no final agenda, or limited availability and time for one-on-one government consultation. Most importantly, the elements outlined in the *Second Report and Order* were not addressed. In both the Broken Arrow and Pala meetings, attending Tribes stated that the meetings did not constitute consultation under §800.14(c). When Tribes directly asked FCC in Broken Arrow and Pala if the meetings were considered consultation, FCC staff members replied that the meeting were not considered consultation. In the NATHPO meeting, FCC staff noted that program exemptions would need initial review by the Advisory Council on Historic Preservation. During the series of January phone meetings, the Nation either stated or concurred with Tribes that our calling into the meeting was for informational purposes only and did not constitute consultation. The Nation did not attend the NCAI Mid-Year Conference or Listening Session as a consulting party (paragraphs 20, 26). In any event, a Federal agency cannot conduct government-to-government consultation with an intertribal organization. The FCC’s proposed decision to move forward with the *Second Report and Order* will alter the consultation process and practices significantly without sufficient consultation with the Nation, and potentially exposes cultural and historic sites to adverse effects hereby eliminating the Nation’s and Tribes’ roles in historic preservation. The Nation remains prepared to consult with the FCC to focus on the issues at hand.

The *Second Report and Order* also contemplates significant changes with Tribes’ current practices, such as upfront research fees and compensation for tribal monitoring, to ensure that cultural and historic resources are protected throughout the early review and implementation processes. The Nation discourages the FCC and industry from adopting these changes. Further, this Office affirms that our approach in reviewing TCNS request is consistent in structure. This Office relies on “special expertise” as defined by §800.4(c)(1). Overall, this knowledge base spans the Nation’s multifaceted history, tribal lands, community, language, qualified

professionals, values systems, and cultural practices. This type of work also requires information that is both sensitive and confidential. This Office is concerned that the FCC would consider an outside contractor would have the specialized knowledge qualified to fulfill this role. For example, the *Second Report and Order* contemplates that an outside contractor could apply “traditional knowledge in assessing the significance of above-ground features” (paragraph 121). Such a statement undervalues the depth of transgenerational and community knowledge required for these types of assessments, and the Nation’s ability to mitigate adverse effects to our cultural and historic resources. Further, the intrinsically sensitive nature of these sites begets the FCC’s and industry need to work with the Nation and this Office rather than to seek the services of an outside contractor to meet its Federal responsibility.

The Nation remains ready to consult with the FCC concerning the issues outlined in the *Second Report and Order* and the NPRM. Understanding the importance of broadband deployment, the Nation is prepared to work with the FCC and industry toward balanced solutions that benefit our mutual goals in historic preservation. If you require additional information or have any questions, please contact me at your convenience. Thank you for your time and attention to this matter.

Wado,



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CC: ACHP
NATHPO
Senator Tom Udall
Senator John Hoeven